No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

BRIEF ON BEHALF OF APPELLEE WILMINGTON TRANSPORTATION COMPANY.

IRA S. LILLICK,
H. R. KELLY,
JOHN C. McHOSE,
YOUNG, LILLICK, OLSON & KELLY,
Banks-Huntley Bldg., 634 S. Spring St., Los Angeles,
Proctors for Appellee, Wilmington Transportation Company.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

PAGE

I. Statement of Facts 3

II. Argument 6

A. Faults of the "Koyei" 6

1. She failed to keep clear although an overtaking vessel required by law so to do 6

2. She failed to distinguish the proper lights on the scows 6

3. She did not have a proper lookout 6

4. She failed to hear or heed the danger signals of the "Fleming" 6

5. She failed to stop when she saw lights ahead which she did not identify 6

B. The "Fleming" and her tow were not at fault 18

1. In the matter of attendants on the scows 24

2. In the matter of use of the searchlight 25

3. In the matter of crossing the channel 26

4. In the matter of lights on the scows 27

5. In the matter of lights on the "Fleming" 29

C. Conclusion 39

PAGE

American, The, 102 Fed. 767 21
American and Syria, The, L. R. 6, P. C. 127 8
Alabama, The, 114 Fed. 214 28
Ariadne, The, 13 Wall. 475, 20 L. Ed. 542 16
Baltimore v. Coastwise, 139 Fed. 777 26
Bigelow v. Nickerson, 70 Fed. 113 37
Brigham v. Luckenbach, 140 Fed. 322 16
Buckeye, The, 9 Fed. 666 37
Buenos Aires, The, 5 Fed. (2d) 425 28
Chamberlain v. Ward, 62 U. S. 548, 16 L. Ed. 211 13
Charles C. Lister, The, 182 Fed. 988 8
Cherokee, The, 1930 A. M. C. 1957 11
City of New York, The, 49 Fed. 956 22
City of New York, The, 147 U. S. 72, 37 L. Ed. 84 19
Civilta, The, 103 U. S. 699, 26 L. Ed. 599 8
Cleadon, The, 14 Moore's Privy Council 92 8
Commonwealth, The, 36 Fed. (2d) 581 ..... 16, 28
Curtin, The, 217 Fed. 245 25
Dentz, The, 29 Fed. 525 37
George W. Elder, 203 Fed. 523 28
Gertrude, The, 118 Fed. 130 21
Gladys, The, 135 Fed. 601 8
Helmsman, The, 11 Fed. (2d) 441 37
Ivanhoe, The, Fed. Cas. No. 7113 8
Jamestown, The, 114 Fed. 593 8
John McCullough, The, 239 Fed. 111 37
Kaga Maru, 18 Fed. (2d) 295 16
Kaiserin Maria Theresa, The, 149 Fed. 97 11
Lizzie M. Walker, 3 Fed. (2d) 921 37
Lucy, The, 74 Fed. 572 8

PAGE

M. J. Rudolph, 292 Fed. 740 19
Maine, The, 2 Fed. (2d) 605 8
Mayumba, The, 21 Fed. 476 8
Mount Hope, The, 79 Fed. 119 20
New England v. U. S., 55 Fed. (2d) 674 13
New York, The, 175 U. S. 204, 44 L. Ed. 126 16
Ottawa, The, 70 U. S. 268, 18 L. Ed. 165 13
Owego, The, 71 Fed. 537 37
Rose Culkins, The, 52 Fed. 328 8
S. H. Crawford, The, 6 Fed. 906 37
Sarmatian, The, 2 Fed. 911 11
Scotia, The, 14 Wall. (81 U. S.) 170, 20 L. Ed. 822 11
Servia, The, 149 U. S. 144, 37 L. Ed. 681 12
Shawmut, The, 261 Fed. 616 25
Sperry Flour Co. v. Coastwise Steamship & Barge Co., 84 Fed. (2d) 785 7
Stadacona, The, 242 Fed. 624 26
Suedco, The, 283 Fed. 796 19
Syracuse, The, 9 Wall. 672, 19 L. Ed. 783 8
Teaser, The, 229 Fed. 476 21
Thomas Carroll, The, 23 Fed. 912 26
Tillicum, The, 217 Fed. 976 16
Umbria, The, 166 U. S. 404, 41 L. Ed. 1053 18
Victory, The, 168 U. S. 410, 42 L. Ed. 519 18
Viking, The, 201 Fed. 424 22
Westhall, The, 153 Fed. 1010 8
Wilbert L. Smith, The, 217 Fed. 981 ..... 15, 16
Wilder's S. S. Co. v. Low, 112 Fed. 161 16
William A. Paine, The, 39 Fed. (2d) 586 11
Wolsum, The, 14 Fed. (2d) 371 19
Yoshida Maru, 20 Fed. (2d) 25 19

No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

BRIEF ON BEHALF OF APPELLEE WILMINGTON TRANSPORTATION COMPANY.

I.

STATEMENT OF THE CASE.

In this brief we will refer to the interests involved as follows: Appellant, Takachiho Shosen Kabushiki Kaisha, Ltd., and the "Koyei Maru", as the "Koyei"; Appellants, Pacific Vegetable Oil Co., Inc., and five others, as the

Cargo; Appellee, Wilmington Transportation Co. and the "David P. Fleming" as the "Fleming". The "Fleming" was admittedly bailee in complete charge of the scow "Pioneer No. 11" which was damaged by the collision.

We will also refer to the Apostles by simply giving the name of the witness testifying and indicating the page number as follows: [Watanabe 310.]

We have little quarrel with the statements of the facts appearing in the able briefs of counsel for the "Koyei" and counsel for the Cargo, except for one or two minor points:

1. Counsel for the "Koyei" state as a fact that the pilot was dropped at 1:55 when opposite No. 2 buoy because he was tired and asked to be relieved. That is in dispute. Pilot Jorgensen testified Captain Watanabe dismissed him and denied that he asked to be dropped. [Jorgensen 297, 308, 309.] We believe Captain Watanabe's statement was made because he thought he ought to offer some excuse because the pilot was not present. He knew the collision could never have occurred had the pilot been on board. He not only would have seen the scows but also would have changed the course of the "Koyei" more to the west upon reaching the lighthouse. Whatever the reason, the "Fleming" was not to blame that the pilot left the ship at No. 2 buoy.

2. Counsel state the course of the "Fleming" crossed the entrance to the main channel of Los Angeles Harbor and emphasis is laid upon the danger of tows in such waters. Any vessel leaving anchorage behind the Long Beach Breakwater and circling the Breakwater to go outside must go through the entrance, assuming the entrance to be the entire stretch between the end of the Long Beach

Breakwater and the lighthouse at the end of the San Pedro Breakwater. However, the main channel, as everyone knows, runs close to the San Pedro Breakwater and the "FLEMING" was never within half a mile of the San Pedro Breakwater and did not *cross* the main channel at all. There was plenty of room for vessels such as the "KOYEI", bound to San Francisco, to swing around the lighthouse and head north with several hundred yards of sea room so far as the "FLEMING" and her tow was concerned. [Charts, "FLEMING'S" Exhibits Nos. 5 and 9.]

3. Counsel for both appellants state as a fact that the lights on the two scows to port of the "KOYEI" did not appear "green" to those on the "KOYEI" until 2:08. Two of the "KOYEI'S" own witnesses, however, squarely disprove this. Takahashi testified definitely and repeatedly that he saw these green lights at 2:06 or 2:07. [Takahashi 438, 439, 479, 481.] Hata also saw green lights to port at the time the engine was reversed at 2:06. [Hata 40.]

Such green lights could only indicate a tow or a sailboat and we do not suppose it is any more customary in Japan than in this country to go sailing at 2 o'clock of an April morning.

The facts, as recited by opposing counsel themselves, show clearly that this collision, in final analysis, was simply a case in which, on a clear night, near the entrance to a large harbor, where tows should have been expected, and in the face of repeated danger signals blown by the "FLEMING", the "KOYEI" carelessly ran down the scow "PIONEER No. 11", which the trial court found properly lighted. In all their testimony in connection with this case those on the "KOYEI" do no more than attempt to offer *excuse*. They fall far short of doing so.

As in every collision case, the detailed facts are in conflict. The substantial picture, as drawn by both parties, however, is that just described. It is what the trial court had in mind as shown by the oral opinion given at conclusion of the trial. [Opinion of the Court, 597.]

II.

ARGUMENT.

A. The Faults of the "KOYEI".

We deem it unnecessary to burden this Court with any long discussion concerning the faults of the "KOYEI". They are so flagrant, so obvious, that even the "KOYEI'S" counsel make little attempt to urge freedom from fault. The only real question presented by this appeal is whether the "FLEMING" was likewise guilty of fault which *was a promixate cause of collision.* The trial court held it was not.

The "KOYEI" was found at fault in the following principal respects:

1. She failed to keep clear although an overtaking vessel required by law so to do.

2. She failed to distinguish the proper lights on the scows.

3. She did not have a proper lookout.

4. She failed to hear or heed the danger signals of the "FLEMING".

5. She failed to stop when she saw lights ahead which she did not identify.

The record supports each of these findings. The "KOYEI'S" counsel make only a short argument on this

subject at the conclusion of their brief and we will content ourselves with a few remarks in answer.

First, let us say, however, that opposing counsel have endeavored to stress the point that an appeal in admiralty is a trial *de novo* and the findings of the District Court are entitled to no weight in this Court. Counsel even suggest the findings were signed without due consideration. That is hardly a fair inference. Counsel presented detailed objections to the findings which were before the District Court when the findings were signed.

In the case of *Sperry Flour Co. v. Coastwise Steamship & Barge Co.,* 84 Fed. (2d) 785, this Court said:

> "In considering this issue the court, in a trial *de novo,* considers the whole evidence pertinent to the issue, *with a presumption that the findings of the District Court are correct.* The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542; Munson S. S. Line v. Miramar S. S. Co. (C. C. A.), 167 F. 960; Brooklyn Eastern Dist. Term v. U. S., 287 U. S. 170, 176, 53 S. Ct. 103, 77 L. Ed. 240; Broughton & Wiggins Nav. Co. v. Hammond Lbr. Co., 84 F. (2d) 496, decided by this court on June 10, 1936. In this case the presumption has its fullest strength, for all of the pertinent evidence was heard *viva voce* by the district judge. Broughton & Wiggins Nav. Co. v. Hammond Lbr. Co., *supra.*"

In the present case the District Court heard all of the evidence of the "FLEMING" but the testimony of the officers of the "KOYEI" was, of course, taken by deposition, all of which, however, were carefully read at the trial.

We gladly concede the point that this court is entitled to review all of the evidence but we respectfully submit that appellee is entitled to the usual presumption the findings of the District Court are correct.

1. Counsels' first point is that the "KOYEI" was not an overtaking vessel with respect to the "FLEMING" and tow. Argument is made that the entire tow must be taken as one vessel and the center of the flotilla considered as the "beam". It is urged the "KOYEI" was not two points abaft such a computed "beam".

The case of the *Gladys,* 135 Fed. 601, is the only one cited in support of this theory. In that case the schooner was the slower of the two vessels which were on converging courses. It was not an overtaking vessel. We have an entirely different situation here. The "KOYEI" was several times as fast as the "FLEMING" with her tow and was unquestionably "overtaking" in every practical sense of the word.

The Charles C. Lister, 182 Fed. 988, also cited by counsel for the "KOYEI", states the correct rule that a tug and tow constitute one vessel. See, also, *The Civilta,* 103 U. S. 699, 26 L. Ed. 599; *The Ivanhoe,* Fed. Case. No. 7113; *The Cleadon,* 14 Moore's Privy Council 92; *The American and Syria,* L. R. 6, P. C. 127.

Furthermore, the law is well settled that a free vessel is required to exercise extra care to avoid an encumbered one such as a tug and tow. *The Maine,* 2 Fed. (2d) 605; *The Jamestown,* 114 Fed. 593; *The Westhall,* 153 Fed. 1010; *The Rose Culkins,* 52 Fed. 328; *The Syracuse,* 9 Wall. 672, 19 L. Ed. 783; *The Lucy,* 74 Fed. 572; *The Mayumba,* 21 Fed. 476.

As a matter of practical common sense how could the unencumbered "KOYEI", approaching a long tow on a course crossing somewhere near the center of the tow, expect to have the right of way? If so, what would the tug do? Under counsels' theory, perhaps, she would be expected to swing around and head back so as to let the "KOYEI" pass in front of her! The tug provides the motive power and control for a tow and it is ridiculous to measure the maneuvers of such a flotilla in any way except by the position of the tug.

2. Counsels' second point is that the "KOYEI" was not at fault in failing to stop at 2:04 instead of merely slowing down when she saw unidentified lights ahead along her course. At that time, the speed of the "KOYEI" was in excess of 10 knots, or 11.5 miles per hour. She slowed to slow speed which gave her an average for the next two minutes of 7.5 knots or 8.6 miles per hour. [Findings 107. Watanabe 353. Stipulation 580.]

The "KOYEI" was in all probability moving faster than her witnesses testified. Those on the "FLEMING" estimated her speed as she passed the light approaching the scows at:

10 or 12 miles [Johnson 160].
10 or 12 knots [Nixon 218].
11 or 12 miles [Cracknell 258].

Those on the "FLEMING" testified the "KOYEI" crossed the line of the scows after the collision. [Johnson 166. Nixon 223, 235. Cracknell 257.]

The speed of the "KOYEI" at full is 15 knots or 17.5 miles per hour; at half, 9 to 9½ knots, or 10.4 to 11 miles per hour; at slow, 6 to 6½ knots or 7 to 7.5 miles per hour. [Watanabe 353. Stipulation 580.]

According to Captain Watanabe's own diagram locating the position of the "KOYEI" at various times preceding the collision ["FLEMING'S" Exhibit No. 5] the approximate times, distances covered and corresponding speeds were as follows:

Times Noted	Minutes Elapsed	Distance Traversed	Average Speed
1:55 to 2:01	6	2,400 ft.	4.6 m.p.h.
2:01 to 2:04	3	3,000 ft.	11.5 m.p.h.
2:04 to 2:06	2	1,500 ft.	8.6 m.p.h.
2:06 to 2:09	3	1,200 ft.	4.6 m.p.h.

If the "KOYEI" was almost dead in the water when the "PIONEER No. 11" was struck it is hard to understand how she traveled 1,200 feet in the last three minutes prior to collision. Captain Watanabe even declared she did not travel more than a ship's length in the last minute preceding collision.

Furthermore, we think the fact is obvious that the "KOYEI" must have struck the tow line hard enough to pull the scow into the "KOYEI'S" hull. If the "KOYEI" had been dead in the water and was struck by the scow which had been traveling 2½ to 3 miles at maximum (and the "FLEMING" was on slow bell for one minute and stopped for another minute prior to the collision [Johnson 181, 182]), it is hard to understand how the empty scow could have bent and fractured four plates and buckled four transverse frames on the "KOYEI".

Captain Jorgensen and Captain Jacobsen, the only two expert witnesses, both of whom were qualified pilots, testified that safe navigation required something more than merely going slow when unidentified lights appeared ahead.

Captain Jorgensen said he would stop rather than go slow. [Jorgensen 303.] Captain Jacobsen believed it advisable to go astern to "take the way out of the vessel". [Jacobsen 499.] If these men, familiar with local conditions, felt that way about it, it would be even more incumbent upon a stranger to Los Angeles Harbor to observe caution.

There are a number of cases holding that when a vessel sees an unidentified white light ahead it is required to stop. *The Cherokee,* 1930 A. M. C. 1957. *The William A. Paine,* 39 F. (2d) 586. We invite the Court's particular attention to *The William A. Paine* in which the Circuit Court for the Sixth Circuit held the Paine solely at fault although a sailboat with which she collided had improper lights.

Opposing counsel cite four cases in support of the proposition that there was no need for the "KOYEI" to stop. In *The Scotia,* 14 Wall. (81 U. S.) 170, 20 L. Ed. 822, the collision occurred in mid-ocean. That is an entirely different situation from a collision at the entrance to a harbor where tugs and tows are very apt to be encountered.

In *The Sarmatian,* 2 Fed. 911, there is an overtaking situation, also in the open sea, in which the vessel overtaken failed to show a stern light or blow a danger signal until too late to avoid collision. In the present case, the "FLEMING" did exactly what the rule stated in *The Sarmatian* requires: that is, she gave notice by blowing the danger signal and she also complied with the general rules by having the customary lights on the scows.

The Kaiserin Maria Theresa, 149 Fed. 97, is another case of collision in the open sea where the overtaken vessel failed to show a stern light. The Court states that a

steamer is not required to maintain a speed so low as to avoid collision with other vessels which may be navigating without displaying lights. We fail to see the applicability of this case in the present situation.

In *The Servia,* 149 U. S. 144, 37 L. Ed. 681, the collision occurred in the daytime when the Serbia ran into the Noordland in the Hudson River because the Noordland failed to stop backing across the river when the Serbia was entitled to assume that she would follow the normal procedure and stop and go ahead after reaching the center of the stream. We see no similarity between these cases.

The point we made at the trial, which was backed up by the expert witnesses, and found as a fact by the trial judge, was not that the "Koyei" *had* to stop or reverse, but that she *took a chance* in proceeding at the speed she did when she saw lights ahead on her starboard hand close by her course, which she failed to properly identify. The point is particularly emphasized because she also admits she saw lights on her port hand which she failed to identify and which she thought were "white" so that on her own story she was actually running right into the center of a number of unidentified white lights.

That alone suffices to account for the collision.

3. The third point is the course followed by the "Koyei". We do not contend the "Koyei" was negligent *per se* merely because she went so far southeast of the breakwater light although bound for San Francisco. But the course was unusual as the Court found and as the expert witnesses testified. [Jergensen 299, Jacobsen 500.] The collision would never have happened had the "Koyei" followed the normal course. The findings on this subject

were merely that the course was unusual and that it was dangerous and negligent for the "KOYEI" to follow that course at the speed maintained after lights were observed ahead in the vicinity of the course. [Findings 108.]

4. The fourth point has to do with the "KOYEI'S" lookout. This point is significant in understanding why the "KOYEI" failed to see the lights of the scows.

It was 200 feet from the stem of the "KOYEI" to her bridge. A good lookout, stationed in the eyes of the ship, would have been that much nearer the scows and closer to the water, having a better view of objects low on the water.

The Ottawa, 70 U. S. 268, 18 L. Ed. 165;
Chamberlain v. Ward, 62 U. S. 548, 16 L. Ed. 211;
New England v. U. S., 55 F. (2d) 674.

The "KOYEI'S" testimony indicates Chief Officer Hata, Boatswain Sugawa, the carpenter and an apprentice seaman, were all on the forecastle head. It is claimed the Chief Officer himself was supposed to be the lookout although that would be unusual practice. But he had other duties. He had to see that any orders given were executed. [Watanabe 375.] Admittedly, the others were there, not as lookouts, but to execute orders. [Watanabe 376.] The boatswain testified he was busy "doubling the screws on the anchor" at the time of collision. [Sugawa 538, 539, 543, 549.] The carpenter and apprentice seaman were not called. We could not get a clear statement as to just what the boatswain was doing. All the depositions of the "KOYEI" witnesses had to be taken by aid of interpreters and in some instances, as opposing counsel note in their own brief, it was impossible to get an intelligent

answer to questions. Suffice it to say, the boatswain had some definite duties with the anchor and was not on lookout.

There apparently is no serious contention that anyone other than Chief Officer Hata was on lookout.

Let us, then, examine the testimony of Hata. On direct examination, of course, he testified he had no other duties than "to keep a good lookout" [38]. On cross-examination, however, he admitted it was his duty to supervise work in connection with the anchor and further that at about the time of the collision two large cork fenders were prepared and it was his duty to supervise this work [45]. Opposing counsel fantastically suggest that these must have been prepared for use at the instant of collision. That is conceivable, perhaps, if a collision is anticipated ahead of schedule, although what good a cork fender would do to prevent collision damage we are at a loss to explain. After collision, the scow was well clear of the "KOYEI" and fenders would have been of no possible use.

The testimony is confusing but it is certainly clear that Hata was supervising some work, whatever it was, and was not *solely* on duty as lookout. That could not be expected of any Chief Officer. As noted above, Captain Watanabe testified Hata's duty would be to see that any orders given were executed. How could he do that and still be the lookout? Captain Watanabe further testified that when he used a lookout he *usually* had the sailors and carpenters relieve each other. [Watanable 374.]

This evidence demonstrates that none of those on the forecastle head that night were specifically charged with the exclusive duty of lookout. If the Chief Officer had

really been on lookout he surely would have seen the lights of the scows before those on the bridge saw them. Yet Captain Watanabe received no warning from anyone on the forecastle head. He "saw it with his own eyes" before anyone warned him. [Watanabe 414.]

Opposing counsel stated there is no testimony in the record from which the deduction can be made that Chief Officer Hata was inattentive to his duties. Obviously such evidence can only be inferential. We submit the record demonstrates Hata was not acting solely as lookout as the law requires.

Any number of cases point out the necessity of having a competent lookout in the eyes of the ship, low to the water, charged with the undivided duty of observation.

In *The Wilbert L. Smith,* 217 Fed. 981, the Court held at page 984:

> "A lookout is a person who is specially charged with a duty of observing the lights, the sounds, and the echoes, with that thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or that of any other person about the ship. And it is the duty of the courts charged with admiralty jurisdiction to give the fullest effect to such duty when the circumstances are such as to call for its application, and every doubt as to the performance of the duty or the effect of nonperformance should be resolved against the vessel in the fault until the contrary is shown by the testimony. The Ariadne, 13 Wall. 475, 20 L. Ed. 542; Wilder's Steamship Co. v. Low, 112 Fed. 161, 50 C. C. A. 473; J. C. Ames (D. C.), 121 Fed. 918."

In *The Commonwealth,* 36 F. (2d) 581, this Court expressed the law in this circuit when it held in part, in holding the Commonwealth solely liable for the collision:

> "The two witnesses on board the Annie at the time of the collision testified that her lights were burning brightly. Three witnesses on board the Commonwealth testified that they saw no lights. The former testimony was positive and the latter negative in its character. The testimony was taken largely in open court, and the finding of the court, based on conflicting testimony, if there was such conflict, should not be disturbed. And if the lights on the Annie were burning brightly as found by the court, it follows almost as a matter of course that the Commonwealth did not maintain a sufficient lookout, or that the lookout did not attend properly to his duties."

See, also:

Kaga Maru, 18 Fed. (2d) 295;
Brigham v. Luckenbach, 140 Fed. 322 at 325;
Wilder's S. S. Co. v. Low, 112 Fed. 161 at 172.

Any doubt as to the performance of the duty of lookout must be resolved against the vessel inculpated until she vindicates herself by testimony to the contrary.

The Ariadne, 13 Wall. 475, 20 L. Ed. 542 at 543;
The Wilbert L. Smith, supra;
The Tillicum, 217 Fed. 976 at 978.

In *The New York,* 175 U. S. 204, 44 L. Ed. 126, the Supreme Court held at page 134:

> "Her officers failed conspicuously to see what they ought to have seen and to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout."

That language applies most appropriately in the instant case.

5. The fifth point is that the "KOYEI" was not at fault for her failure to identify the lights at an earlier time or to hear the danger signals. We will discuss this subject at length later in this brief. Suffice it here to say that the trial Court specifically found those on the "KOYEI" were negligent in not seeing the lights on the scows which were lit and burning [Findings 106, 109, 111], and in the oral opinion stated:

> "It seems to me, however, that a conclusion in favor of the "FLEMING" is forced upon the Court, because I see no reason to disregard or disbelieve the evidence that the last two tows were properly lighted. The first one might not have been. The preponderance of the evidence, however, I think obviously shows that it was lighted * * * I think the fault was on the steamer in not recognizing the lights of the scows, and particularly the lights of the scow with which it collided."

There is positive testimony by all those on the "FLEMING" that four danger signals were blown. Those on the "FLEMING" heard the danger signal blown by the "KOYEI MARU" shortly prior to the collision. The "KOYEI" has offered no explanation whatsoever for failing to hear the whistles blown by the "FLEMING".

The trial court's specific findings on these faults of the "KOYEI" is amply sustained by the evidence.

B. The "FLEMING" and Her Tow Were Not at Fault.

In their briefs opposing counsel present, substantially, five identical points of alleged fault on the part of the "FLEMING" and her tow which we will consider in order.

First, however, we want to call the Court's attention to a few general legal principles here applicable.

The Court will find ample reason to sustain the District Court's findings that the "KOYEI" was guilty of several faults. We differ with opposing counsels' contentions as to the burden on the "FLEMING". Where one vessel is clearly at fault there is a presumption as to her sole fault. Under the facts of this case the presumption applies that the "KOYEI" was solely at fault and there must be clear proof of fault on the part of the "FLEMING" before she can also be held responsible for the collision.

In *The Victory,* 168 U. S. 410, 42 L. Ed. 519, the Supreme Court held at 528:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

In *The Umbria,* 166 U. S. 404, 41 L. Ed. 1053, the Court held at page 1057:

> "Indeed so gross was the fault of the Umbria in this connection that we should unhestitatingly apply the rule laid down in the City of New York, 147 U. S. 72, 37 L. Ed. 84, and the Ludvig Holberg, 157 U. S. 60, 39 L. Ed. 620 that any doubts regard-

> ing the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

In *The City of New York,* 147 U. S. 72, 37 L. Ed. 84, the Court held at page 90:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety to the conduct of such other vessel should be resolved in its favor."

Many cases adhere to the rule that where fault of one vessel is obvious, evidence to establish fault on the part of the other must be clear and convincing to make a case for dividing damages. In *The Yoshida Maru,* 20 F. (2d) 25, this Court adopts the rule expressed in *The City of New York.* See also *The Suedco,* 283 Fed. 796; the *M. J. Rudolph,* 292 Fed. 740; *The Wolsum,* 14 F. (2d) 371.

With these principles in mind we consider the claims of negligence against the "FLEMING".

1. The first point is the matter of carrying attendants on the scows. The scows in question were small flat dump scows which were towed to Catalina empty with a freeboard of about nine feet, and brought back loaded with the decks practically awash. No regulation requires attendants to be carried on such scows. They are dump scows, not large barges. ["FLEMING'S" Exhibits 10 and

11.] There is ample testimony to the effect that it would be dangerous to attempt it. [Connor, 587, 590; Jacobsen, 502, 505, 506, 507; Johnson 199.]

As a practical matter, men were not carried on any of the scows engaged in the Catalina rock run. [Jorgensen 313.]

The danger of placing a man on a scow without any shelter or protection is so obvious as to require little comment. No purpose would be served by doing it. There is no necessity for warning an approaching vessel because such warning is given by the lights of the scows or by the lights of the towing vessel. This is especially true on a clear night as was that in question. [Jorgensen 310; Jacobsen 502, 505; Connor 581.] Counsel suggest the danger of fog but in case of fog special fog signals are specified which the towing vessel is required to blow indicating it has a tow. (Section (e), Rule 15, Rules of the Road.)

It would only be in case of negligence on the part of an approaching vessel that an attendant on a scow might do any good by attempting some warning and that would put him in a position where he would be risking his own life.

Counsel cite several cases in which there is language to the effect that the use of long tows in much frequented waters is dangerous and requires extra precautions on the part of the towers.

Nearly all of the cases cited involve very long, seagoing tows and in most of them the tows were for long distances.

In *The Mount Hope,* 79 Fed. 119, three very large coal barges towing coal from Vineyard Haven, New Hamp-

shire to Baltimore, on a long ocean tow, were involved. All the barges had several attendants. When danger of collision with a schooner threatened during a fog one of the barges was cut loose. It had no means of signalling the tug which did not know the hawser had been cut. After anchoring for a time the barge attempted to make for shelter with improvised sails. She got into a current and went ashore becoming a total loss. The Court held the schooner was not responsible for her loss both because her speed was not immoderate and because *unforseeable intervening* causes really caused the loss. The case is not remotely akin to the present case. The fault found was that no means of communication or signalling between the barges was provided although each had a crew on board.

In *The American,* 102 Fed. 767, a tug with three barges in tow on a clear night failed to see a properly anchored ship until so close that when she attempted to swing clear the leading barge struck the ship. Obviously the mere fact that a moving vessel struck an anchored one was sufficient to establish fault on the part of the tug and tow. The Court indicates there should have been someone on the barge to cut her hawser but does not state how this might have avoided collision and does not consider that the tug herself could also have cut the hawser. The tug's fault was clear, irrespective of the matter of an attendant on the barge.

In *The Gertrude,* 118 Fed. 130, the nature of the tows does not appear but the tug was flagrantly negligent.

In *The Teaser,* 229 Fed. 476, large seagoing barges bound from Philadelphia to New England were involved. A collision resulted from negligence of the *steersman* on one of the barges who ran into a vessel which was not

at fault. Any barge with a rudder requires an attendant. The Court held the barge at fault for reckless steering.

The Viking, 201 Fed. 424, was another case in which a tug and tow ran down an anchored vessel. Obviously the tug was liable. She had a rudder and had to have attendants.

In *The City of New York,* 49 Fed. 956, the Circuit Court of Appeals for the Second Circuit reversed a decision in which the District Court held two tugs which were jointly towing fourteen canal boats and barges liable in divided damages with a steamboat which collided with one of the canal boats. The District Judge condemned the tugs for negligence in not giving signals from the boats in tow during a fog. The Circuit Court, however, held in this regard at page 957:

> "We do not think the tugs were guilty of any negligence which was contributory to the collision. Concededly, they performed all their statutory duties. What signals should they have given from the boats or barges? Should it have been a mechanical foghorn or a bell? The one would have indicated the presence of a sailing vessel under way, and the other of a steam-ship or sailing ship not under way. If either of such signals had been given, and the collision had taken place, it could have been very persuasively urged that the steamboat was misled thereby. From what place in the tow should the signals have been given? If they had been given from the rear end, or from the middle, would not an approaching steam-ship have felt safe in steering between that place and the signals from the tugs? It may be doubted whether the use of any fog signals, not embraced in the code of signals prescribed by statute, and which are intended to give precise and

definite information, is legally allowable. It may be doubted whether the giving of fog signals by boats or vessels in tow would tend to diminish the risk of collision, and whether the multiplication of signals would not lead to confusion and misconception. The board of supervising inspectors of steam-vessels, until as late as 1886, seemed to have supposed that they were authorized under section 4412 of the Revised Statutes to prescribe supplementary fog signals for steam-vessels, and did prescribe them for such vessels while towing. Tows like the one in the present case were common, and had been for many years, on the great rivers and in the Harbor of New York. Yet the inspectors do not seem to have considered it expedient to make any other regulations applicable to the navigation of such tows than that the steam-vessel should sound the signal of three blasts in quick succession to indicate that she was towing. And it is significant that in the act of congress of August 19, 1890 (26 St. pp. 320, 326, c. 802, art. 15, subd. 2f), adopting, among other things, the code of fog signals devised by the international marine conference, while vessels being towed are permitted to give a specified signal, they are not required to give any, and are expressly prohibited from giving any other than that which is required to be given by the towing vessel. It is possible that if some signal had been given in the present case from some one or more of the boats of the tow, or alongside, the steam-boat might have heard it, and so governed her movements as to avoid collision. But the tugs had little time in which to adopt any special precautions, as it was only about five minutes before the collision that the fog became sufficiently dense to require them; and they are not to be held liable merely because, in the light of subsequent events, it appears that something not

done might have been useful. The collision would not have happened if the steam-boat had exercised the degree of care required of her under the circumstances of the case."

Let us concede that appellee, as the custodian of a flotilla consisting of a towboat and three scows, was required to exercise a high degree of care in navigating such a flotilla across the Catalina Channel. These are facts:

1. Appellee wrote the United States Steamboat Inspectors to ascertain exactly what lights were required on the scows. [Connor 318-320. "FLEMING'S" Exhibit No. 15.]

2. Appellee purchased special lights to comply with instructions of the Inspectors received in reply. [Connor 321-323. "FLEMING'S" Exhibit No. 15.] We submit these lights were the best appellee could possibly supply for the scows and invite the Court's examination of "FLEMING'S" Exhibits No. 13 and 14. Kerosene lights on vessels not equipped with electric power have been in use for many, many years. We do not see what fault can be found with them.

3. A special Notice to Mariners was sent out by the United States Hydrographic Office warning of the tows crossing to Catalina. ["FLEMING'S" Exhibit No. 7.]

4. Tugs had been towing rock barges to Catalina for years prior to the collision. This should have been a matter of common knowledge. [Jorgensen 502, Jacobsen 313, Connor 316, Nixon 210, Johnson 134, Cracknell 248.]

In the absence of any regulation requiring the scows to carry men and in view of the obvious practical objections to doing so we submit negligence in not having attendants on the scows has not been established.

2. The second point is the claim the search light of the "FLEMING" should have been turned on earlier.

Now, in the first place, it does not lie with appellants to condemn the "FLEMING" for a failure to give a warning by turning on a search light she was not required or expected to use. The use of the search light was an extraordinary measure within the discretion of Captain Johnson. Certainly, it might have occurred to him to use the light earlier. But if it did not, appellants have no right to criticize. Captain Johnson expected the "KOYEI" to heed his danger signals and to stop momentarily. When he finally realized she was not going to stop, he thought to turn on the search light but it was too late. That was no fault of his; it was the fault of the "KOYEI".

In the second place, negligence in admiralty is the same as in the law in any field. Negligence must contribute to the collision before there is liability in a collision case. In *The Shawmut,* 261 Fed. 616, the court held at 620:

> "the negligence with which the law maritime concerns itself, as does the law of negligence everywhere, is not negligence, but negligence which contributes to the injury done."

In *The Curtin,* 217 Fed. 245, the court held at 247:

> "Whether negligence imputed is the proximate cause or merely collateral or immaterial is a question of fact, and where the conclusion of the District Court is not against the preponderance of the evidence it cannot be disturbed."

Many cases hold that where a collision is due to clear fault on the part of one vessel, she cannot escape by merely casting doubt on the conduct of another which will not

also be condemned unless her fault appears clearly and satisfactorily a contributing cause. In addition to the cases above cited, see *The Thomas Carroll,* 23 Fed. 912; *The Stadacona,* 242 Fed. 624; *Baltimore v. Coastwise,* 139 Fed. 777.

The fact that the "FLEMING" did not use her search light until two minutes after she first became aware that the "KOYEI" was heading toward her tow was not a proximate cause of this collision.

3. The third point is that the "FLEMING" was negligent in proceeding unnecessarily close to the entrance of the harbor.

This appeals to us as a very futile argument. As a matter of fact the "FLEMING" proceeded more directly for her objective than did the "KOYEI". It is easy to say that the collision might not have occurred if the "FLEMING" and her tow had "cut the corner" of Long Beach breakwater more sharply (assuming that was possible) and proceeded to Catalina Island, let us say, seven-eighths of a mile instead of three-quarters or half a mile off the San Pedro Breakwater. Or, perhaps, counsel would expect the "FLEMING" to circle the breakwater and then tack to the southeast, later straightening on a course to Catalina?

But, correspondingly, the collision would never have occurred if the "KOYEI" had not gone nearly a half mile *out of her course,* instead of rounding the San Pedro Breakwater in the usual fashion to head toward her objective, San Francisco.

Those on the "FLEMING" testified the tug swung the scows around the Long Beach Breakwater in the usual fashion and on a normal course. [Johnson 152, Nixon

214.] The tow had straightened on the course before the "KOYEI" was sighted. [Johnson 174, Nixon 215, Cracknell 250.] The flotilla did not obstruct the actual main channel into Los Angeles Harbor and there was plenty of sea room for the "KOYEI" to have avoided her.

4. The fourth point is that the lights on the scows were inefficient and defective and were not lighted.

In this respect, we willingly invite the Court's attention to the record as well as the District Court's specific findings that the lights on the scows were proper in all respects. The testimony was clear:

The green lights were burning on all three barges at all times. They were lit before the barges were picked up. [Nixon 211, 212; Cracknell 247]. They were lit and burning properly and were not out of adjustment when they were put on the barges [Nixon 289, Johnson 171]. They were burning and observable while the "KOYEI" approached. [Johnson 151, 161; Nixon 222, Cracknell 253, 254.] They were burning and observable right after the collision. [Cracknell 259, Nixon 224.] They were also burning and observable when the tug went to the barges after the collision. [Johnson 169, Nixon 224, Cracknell 261.] They were *not* smoked. [Cracknell 261, Nixon Apostles 223, 585.] They were burning and observable when the tow boat went over to the lighthouse and were seen from the lighthouse, which is approximately the direction of the "KOYEI'S" approach. [Nixon 225.] They were burning when the other tug came out to pick up the damaged scow. [Mehler 292, 293.] They burned, in fact, until they were put out by Nixon after they had been taken on the "FLEMING" about 4:30 that morning. [Nixon 228, 586.]

It requires only a brief glance at the lights themselves to show that it would be almost impossible for them to smoke in such a way as to show ahead and not show to the side. The lights are so constructed that if the chimneys were smoked they would undoubtedly be smoked so that they would not show either ahead or to the side. We invite the Court's attention to the "FLEMING'S" Exhibits 13 and 14 which are the lights in use the night of collision.

Those on the "KOYEI" tell us the green lights appeared to the "KOYEI" to be white and, Chameleon like, turned green shortly before the collision. Those on the "FLEMING" testified definitely that the green and red lights were both plainly observable. They were farther away from the after scow than those on the "KOYEI" when danger of collision became imminent.

It is well established that positive testimony that lights were burning outweighs negative testimony that lights were not seen. *The Commonwealth,* 36 Fed. (2d) 581 (*supra*); *George W. Elder,* 203 Fed. 523; *The Buenos Aires,* 5 Fed. (2d) 425; *The Alabama,* 114 Fed. 214.

Opposing counsel cite a number of cases as authority in this connection to reverse the trial court's finding that the lights on the scows were proper. All are readily distinguishable from the present case. In several the court found that obstructions, such as sails, obscured the lights. In others the testimony was overwhelming that the lights were not lit or were defective. And in every one, the lights in doubt were on one ship with which another collided directly. In such cases those on the ship whose lights are in doubt are not always in a good location to know whether their lights are burning and observable at a distance. In the present case the witnesses on the "FLEM-

ING" were naturally watching the scows and in position to know definitely whether the colored lights were observable. The trial court's finding in this respect is strongly supported by much the preponderance of the evidence.

The test of the lights made by Captain Johnson and Captain Jacobsen in December, 1935, also showed the lights could be seen readily for the required distance under conditions similar to those existing the night of the collision. [Jacobsen 492-498. Johnson 581-583.] It is claimed this test is entitled to little weight. A "little weight" is ample to support and confirm the other positive testimony.

The lights were specially purchased as lights constructed for the specific use to which they were put as prescribed by the United States Steamboat Inspectors. [Connor 323.] This Court can judge from its own examination of the lights whether they were proper.

The positive evidence is thus overwhelming that the lights were not inefficient or defective as against the negative inference of appellants that they were defective because those on the "KOYEI" apparently failed to see them, or rather, failed to properly distinguish them.

5. The fifth point is the matter of the alleged fault on the part of the "FLEMING" with respect to her own lights.

Now, the argument in this respect is, of course, an attempt on the part of the "KOYEI" to excuse her own negligence. Yet, color is lent to it and it is the strongest point appellants make because it does so happen that the lights on the "FLEMING" did not strictly comply with the International Rules which are set forth at length in the "KOYEI'S" brief. This is the only basis of fault urged

against the "FLEMING" which warrants consideration by this Court.

The "FLEMING" displayed the ordinary lights carried by tow boats. It happens that Article 2 (f) of the Inland Rules provides the range light or after light shall show *all around the horizon.* Article 2 (e) of the International Rules, however, provides a range light *may* be carried similar in construction to the masthead light. According to Article 2 (a) the masthead light shall "show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side."

Similarly, Article 3 of the Inland Rules differs from Article 3 of the International Rules in that towing lights in inland waters need be only three feet apart whereas in international waters they should be not less than six feet apart.

In addition, both the International and Inland Rules specify that the range light should be carried at an elevation at least fifteen feet above the masthead light.

As a practical matter it is inconvenient to change the range light when a vessel crosses the line between Inland and International waters. Steamers universally carry their ordinary screened range lights on entering harbors and towboats carry their regular Inland type range lights when towing out to sea. Navigators know these changes are not made.

Few towboats have masts sufficiently high to enable them to carry towing lights arranged six feet apart or a range light fifteen feet higher than the masthead light.

This would require an aftermast of around 35 feet and very few towboats are equipped with masts of more than 20 feet.

Captain Jorgensen testified that towboats as a rule use the same lights whether they are working inside or outside. He mentioned San Francisco and Puget Sound towboats in this connection as well as the local vessels. [Jorgensen 309, 312.]

The towing lights of the "FLEMING" *were* only three feet instead of six feet apart; her range light *was not* fifteen feet higher than her masthead light and it *was* visible all around the horizon. Custom probably provides no legal excuse for these differences *if any of them actually caused the collision.* But the trial court found none none of them caused or contributed to the collision and the record sustains that finding.

We should be mindful that the clear faults of the "KOYEI" suffice to account for the collision, and burden her with establishing that fault of the "FLEMING" was also a proximate cause of collision.

Counsel for appellants concede the towing lights were not visible to those on the "KOYEI" so this fault could not have contributed to the collision and need not be considered. ("KOYEI'S" Brief 32; Cargo's Brief 18.)

The requirement that the range light be 15 feet higher than the masthead light is for the purpose of facilitating determination of the angle of approach or change of course by comparison of these two lights when both are in view. (*La Boyteaux, Rules of the Road,* 20.) It is of little consequence when the masthead light is out of range as in the present case. Here, it is urged as a fault

only because it "looked like a towing light in combination with the stern light."

Counsels' chief contention, of course, is that the "FLEMING" was at fault because her range light showed abaft the beam.

However, the "FLEMING" was entitled to carry *another* light which might have done just that. Article 3 of the International Rules also provides that a vessel towing "may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam." There was no need for such a light on the "FLEMING" because the scows were not steered, but we respectfully suggest that such a light might have been used and would have been similar to the range light in appearance. Its location would be abaft the funnel or aftermast and it would be visible to the "KOYEI" which admittedly was abaft the beam of the "FLEMING." There is no requirement as to height and such light might be carried in the exact location of the range light.

We respectfully submit also that a situation like the present requires some sensible, practical consideration. There might well have been several white lights on the after part of the "FLEMING" which would be visible to the "KOYEI." The lights in the engine room, for example, might show through the windows. The stern light would also be visible. In addition, the "FLEMING" might have carried the small white light abaft the funnel, as noted.

Now, counsel's argument is based upon the proposition that the lights on the "FLEMING" were *deceptive* because the range light and the stern light looked like two white lights one above the other and Captain Watanabe thought he caught a flicker of a green light which made him think there was a vessel ahead with a single tow. It is demonstrable from his own testimony that it was impossible for Captain Watanabe to see the green light on the "FLEMING" at the time he says he saw it. We know of no rule which might hold the "FLEMING" liable for what Captain Watanabe *thought* he saw.

Captain Jorgensen testified that a navigator could not conclude another vessel was towing a single vessel unless he *definitely saw the colored side light as well as the towing lights.* [Jorgensen 311.] Captain Watanabe admitted he saw only a momentary flash of a green light. [Watanabe 412.] If he did not see a green light plainly he had no right to assume one was there.

Counsel for both appellants concede the "FLEMING'S" towing lights on the foremast were "at all times obscured" from the "KOYEI" by the screens. Yet both counsel urge the green light, which was screened exactly as the towing lights, *was* seen by Captain Watanabe and *deceived* him. It is claimed the combination of the range light *and* stern light *and* green light made Watanabe think a towboat with one object in tow was ahead of him. Obviously, it required a combination of *all* these lights to deceive the learned navigator.

So far as the green light is concerned opposing counsel admit it was on the extreme range of visibility.

("KOYEI'S" Brief 34.) Captain Watanabe knew he could not claim to have seen it steadily so declared he saw a *momentary* flash of green. Honda, the only other witness on the "KOYEI" who claims he saw a green light on the "FLEMING," said he saw it, apparently as a steady light, just before the collision. [Honda 565.] He placed it four points or at a right angle to starboard of the "KOYEI." [Honda 566.] That was manifestly impossible.

To illustrate in this connection we have attached as Plate A a photostat of a sketch showing the approximate position of the "FLEMING" and the "KOYEI" at 2:06, the time Captain Watanabe says he saw the "flash of green." The positions are traced from those located by Captain Watanabe himself. [Chart, "FLEMING'S" Exhibit No. 5.] They are approximate but were carefully charted. [Watanabe 381-388.]

Plate A shows the "FLEMING" on a course of South which is that testified to by those on the "FLEMING." There was some testimony by those on the "KOYEI" that they thought the "FLEMING" may have been headed more to the West but unless she was far off the proper course leading to her objective [Chart, "FLEMING'S" Exhibit No. 9] her green light could not possibly have been seen on the "KOYEI" at 2:06 or for some time prior thereto. The green light on the first scow would also be out of range. Some argument is also offered to suggest the "FLEMING" may have temporarily swung off her course but this conjecture of opposing counsel was contradicted by the "FLEMING'S" positive testimony that a towboat keeps a better course with a tow than without one because the towline keeps the tug steady. [Johnson 174; Nixon 243.]

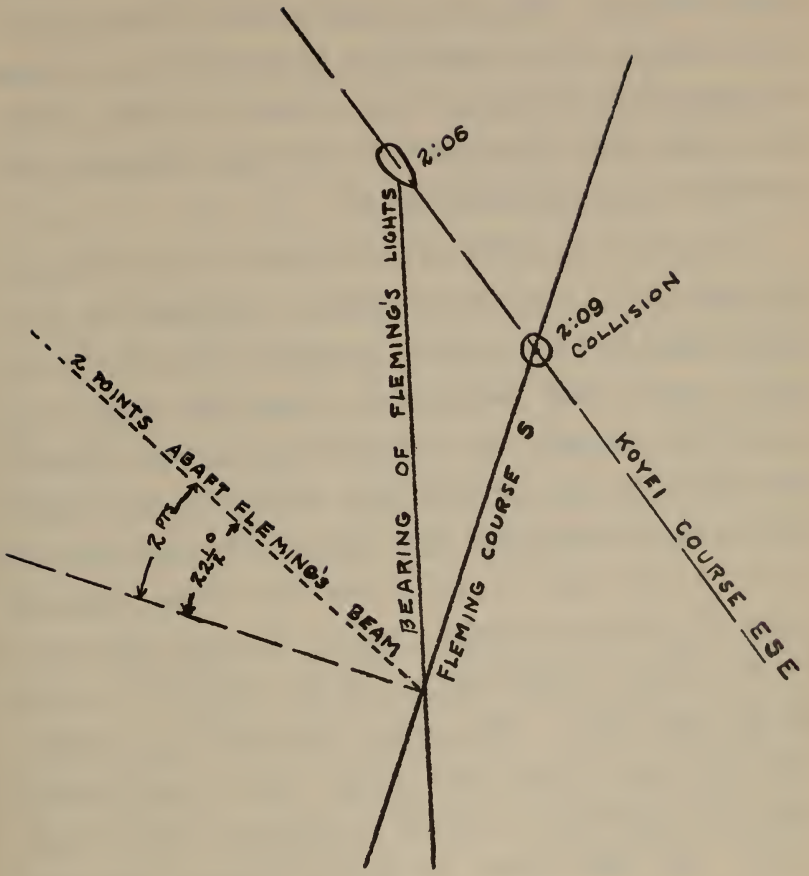
2:06
2:09
COLLISION
BEARING OF FLEMING'S LIGHTS
FLEMING COURSE S
KOYEI COURSE ESE
2 POINTS ABAFT FLEMING'S BEAM
2 PTS
22½°

PLATE A

Counsel also suggest the man at the wheel was watching the tow instead of his course. It is perfectly natural with a tow to look aft frequently to make sure all scows are following. That can readily be done without getting off course as far as would have been necessary to bring the green light in range of the "KOYEI" at 2:06. Steering a boat does not require the attention necessary, for example, in an automobile driver.

Counsel also argue the "KOYEI" had no means of knowing there was a tug and tow ahead. As noted, the chief point urged by both opposing counsel is that the "FLEMING" was at fault because her range light showed all around the horizon and confused those on the "KOYEI" into thinking that a tug with a single tow was ahead. Let us assume the range light *had actually* been screened so as to show only two points abaft the beam. In such event, the "KOYEI" could not see it. The only light those on the "KOYEI" could then see on the "FLEMING" would be the stern light. That surely would give no information that a tug and tow were ahead. Yet it would comply with the regulations *as urged by opposing counsel themselves*. For that reason, the full visibility of the range light *helped* rather than *hindered* the "KOYEI". Had she seen the stern light alone Heaven only knows whether she would *ever* have reversed or dropped anchor and a head-on collision with one of the scows might have resulted.

It has been held that mere violation of rules of the supervising inspectors, although such rules have the force of statutes, will not charge a vessel if the proximate

cause of the collision was the fault of the other vessel and violation of the rule was a remote and not a contributing cause. *The Dentz,* 29 Fed. 525.

A number of cases hold that failure to show proper lights does not make a vessel liable for a collision when the omission did not cause the collision. *Bigelow v. Nickerson,* 70 Fed. 113; *The Buckeye,* 9 Fed. 666; *The Owego,* 71 Fed. 537; *The John McCullough,* 239 Fed. 111; *The S. H. Crawford,* 6 Fed. 906.

In *The Helmsman,* 11 Fed. (2d) 441, the Court held that *The Helmsman* and her tow were on the high seas when the collision occurred and under the International Rules should have carried red and green lights on the scows, whereas they only had white lights in accordance with the Inland Rules. The Court held this did not contribute to the collision.

In the *Lizzie M. Walker,* 3 Fed. (2d) 921, the Circuit Court of Appeals for the Fourth Circuit held that improper lights on a scow constituted a serious fault but did not contribute to the collision and resolved any doubt as to the contribution of fault in favor of the scow in accordance with the general rule.

The principles of these cases are peculiarly applicable here.

The answer to all this extended discussion is simply that the scows themselves show what they are. When a string of green lights without white masthead lights shows ahead of a vessel there is obviously a tow. Such tows

have been crossing the channel to Catalina daily for years. [Connor 316; Johnson 124, 135; Nixon 210; Cracknell 248, 249; Jorgensen 313; Jacobsen 501.] If those on the "KOYEI" did not know this it was their own fault or that of the agents representing them at Los Angeles Harbor. The United States Hydrographic Office sent out a special bulletin on this subject in August, 1933. ["FLEMING'S" Exhibit No. 7. Stipulation 325, 326.] It seems odd this bulletin was not received although another from the Hydrographic Office stating work was being done on the breakwater was admittedly received on the "KOYEI." [Honda 572.]

In final analysis the collision was due to one major inexcusable fault—the failure of the "KOYEI" to see the green lights on the scows. Why they were not seen is difficult to understand. It is possible those on the "KOYEI" were watching the "FLEMING" to determine what it was or were thinking about swinging to starboard and simply failed to keep a good lookout ahead and to port. It is also possible that those on the bridge were too high to get a clear view of the low lying scows. But a good lookout surely should have seen them. When the scows were finally distinguished the speed of the "KOYEI" was such that she could not stop in time to avoid collision.

C. Conclusion.

As usually happens this brief has grown longer than we ever intended it to be and yet other arguments occur to us.

We will briefly mention one or two and call it a day.

No complaint has been made that the "FLEMING" was negligent in stopping when Captain Johnson realized collision was imminent although technically, as the overtaken vessel, the "FLEMING" was supposed to keep her course and speed. Opposing counsel realize that if the "FLEMING" had not stopped the "KOYEI" in all probability, would have struck the "PIONEER No. 11" head on, with substantially greater damage to both vessels. The stopping of the "FLEMING" did not cause the collision and, in fact, proved very much a blessing to all concerned.

May we refer finally to the evasiveness of the "KOYEI'S" witnesses in their answers to many questions in the depositions? Not all of this was due to difficulty of understanding. Captain Watanabe, for example, hesitated to admit that if he had seen a single vessel at 2:04 headed south he would have passed astern of it. [Watanabe 401-405.] Again, he did not want to admit he expected no reply to his one blast whistle. [Watanabe 406-409.]

As evidence of supreme caution Takahashi said he warned the engine room to be careful—for what purpose imagination hardly suffices. [Takahashi 465.] His system of note keeping is also interesting. He brought out first one sheet, then another, then still others, all containing

notations as to times which were not entirely in accord. ["Fleming's" Exhibits Nos. 1, 2, 3, 4, 6.]

All of this is relatively unimportant. We mention it merely because we firmly believe the testimony of the "Koyei's" witnesses discloses of itself that this collision occurred because of carelessness on board the "Koyei" which her witnesses vainly sought to excuse and which counsel have endeavored to becloud by crying "Wolf! Wolf!" at the "Fleming".

The decision of the District Court should be affirmed in all respects.

Respectfully submitted,

Ira S. Lillick,

H. R. Kelly,

John C. McHose,

Young, Lillick, Olson & Kelly,

Proctors for Appellee, Wilmington Transportation Company.